

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

**ARTISTIC INSTALLATIONS, INC.¹
Employer**

and

CASE 7-RC-22065

**MICHIGAN REGIONAL COUNCIL OF
CARPENTERS, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA²
Petitioner**

and

**LOCAL 337, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO
Intervenor**

APPEARANCES:

Harvey Wax, Attorney, of Farmington Hills, Michigan, for the Employer.

Nicholas Nahat, Attorney, of Southfield, Michigan, for the Petitioner.

Wayne A. Rudell, Attorney, of Dearborn, Michigan, for the Intervenor.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

¹ The Employer's name appears as stipulated at the hearing.

² The Petitioner's name appears as corrected at the hearing, and by a sua sponte correction of the transcript (TR. 8, line 14) to substitute "Joiners" for "Journeyman."

Upon the entire record in this proceeding, the undersigned finds:³

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organizations involved claim to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Petitioner seeks to represent approximately nine full-time and regular part-time laborers, apprentices, mechanics, journeyman mechanics, senior mechanics, and master mechanics employed by the Employer at and out of its facility in Warren, Michigan. All parties stipulated to the appropriateness of the sought unit, and to the exclusions of sales employees Carrie Allen, Kenneth Bender, and Tim Craddock, office clerical employee Christine Paulson, independent contractor Raoul Fett, and supervisors Judy and Reinhold Bender.⁴ The Employer and Intervenor are parties to a collective bargaining agreement effective by its terms from May 31, 2001 through May 31, 2005. The central question for decision is whether the contract bars the conduct of an election.

Since its inception in 1997, the Employer has been in the business of installing floor coverings. Carpet and vinyl comprise 80% of the installed materials; other coverings, such as tile and rubber, account for the remaining 20%. The flooring products are manufactured by outside vendors, not the Employer. The Employer's jobs, split about equally between new construction and renovation projects, are almost entirely commercial rather than residential. The Employer is hired both by general contractors and property owners directly.

The mechanics, two of whom are considered journeymen, perform work, check for quality, and oversee the laborers. Projects may include scraping off existing flooring, applying a cove base around perimeter walls, or building up a

³ All parties submitted briefs, which have been carefully considered.

⁴ The parties stipulated, and I concur, that Judy Bender, the Employer's owner, and her husband Reinhold Bender, the Employer's operations manager, possess indicia of supervision as set forth in Section 2(11) of the Act, and are therefore statutory supervisors.

floor level by several inches. Whether the job involves renovation or new construction, workers use the same tools and equipment, such as grinders, blades, knives, carpet stretchers, brooms, shovels, hammers, and chisels. Employees generally wear the same work attire on all of their jobs, with the caveat that long pants and hard hats are generally required on new construction sites.

The Employer also sells flooring. Whether any sales are retail, in contrast to wholesale selling of flooring material as a component of installation service, is not disclosed in the record.

In 1997, the year of the Employer's genesis, two of its employees contacted the Intervenor and signed cards expressing a desire to be represented by the Intervenor. The employees were not identified in the record, nor were the cards adduced.⁵ About one week later, the Intervenor's business agent, Reno Mifsud, met with the Employer's operations manager, Reinhold Bender. Mifsud asserted to Bender that a majority of the company's employees had signed cards with the Intervenor. He asked the Employer to recognize the Intervenor and begin negotiating a contract. According to Mifsud, Bender responded "okay." Mifsud testified that he did not offer to produce the cards, nor did Reinhold Bender ask to see them.

Reinhold Bender and Mifsud subsequently met and negotiated a collective bargaining agreement, bearing an execution date of June 1, 1997, effective from June 1, 1997 through May 31, 2001. The recognition clause of the 1997-2001 contract stated as follows:

The Employer recognizes and acknowledges that the Union is the exclusive representative in collective bargaining with the Employer for those classifications of employees covered by this Agreement and listed in the attached Schedule "A." The terms of this Agreement shall apply to all employees in the classifications of work set forth herein and shall cover all accretions to or relocations of bargaining unit operations, including newly established or acquired warehousing, transportation or processing operations of the Employer. Other newly established or acquired operations of the Employer shall be covered by this Agreement at such time as a majority of employees in a [sic] appropriate bargaining unit designate, as evidenced through a card check, the Union as their bargaining representative.

⁵ The Intervenor's business agent testified that, pursuant to a subpoena from the Petitioner, he looked for these two cards shortly before the hearing and could not find them.

Although both Reinhold and Judy Bender testified at the hearing, neither gave evidence regarding the circumstances of the Employer's grant of recognition to the Intervenor.⁶ The only evidence on that point was the foregoing testimony of Mifsud.⁷ Nor was either Reinhold or Judy Bender asked how many flooring installers they employed at the time recognition was granted. In fact, the record does not definitively disclose the size of the unit at any given time other than the present. The only evidence as to the number in the unit in 1997 is Mifsud's testimony that he recalls a complement of three workers when the parties negotiated their first agreement. His basis for the recollection is not revealed.⁸

According to Mifsud, at all times a majority of unit employees have been members of the Intervenor. The sole employee who testified stated that he has been an Intervenor member for about four years.⁹ The Intervenor introduced a blank exemplar of a tripartite authorization, dues checkoff, and political donation card that it asks employees to sign. Mifsud testified that unit employees of the Employer have executed cards "like" those exemplars. No party offered executed cards into evidence.

About April 2001, the Intervenor gave notice to forestall automatic renewal of the 1997-2001 contract, and thereafter entered into negotiations with the Employer for a successor agreement. The agreement reached was unanimously ratified on May 31, 2001 by seven employee-members of the Intervenor. The resultant contract is effective by its terms from May 31, 2001 through May 31, 2005. Its recognition clause is virtually identical to that of the 1997-2001 agreement.¹⁰

The 2001-2005 contract, claimed by the Intervenor and the Employer to bar the instant petition, is bilaterally executed with undated signatures. Extrinsic evidence adduced at the hearing reveals that the Intervenor signed the contract sometime in the week before June 23, 2001, the Employer sometime in the week following that date.

⁶ Judy Bender testified that she once saw two signed cards. Whose cards she saw, and when or why she saw them, was not revealed. There is no indication in the record that Judy Bender played a role in recognizing or negotiating with the Intervenor.

⁷ Attempts by Petitioner's attorney to elicit whether and when the Employer ever saw actual evidence of the Intervenor's claimed majority were thwarted by objections from the Intervenor's attorney.

⁸ Mifsud also testified, "I think they said there was two or three employees working there" when he asked for recognition. (Tr 76) The identity of "they" was not disclosed.

⁹ Whether this employee was one of the original two card-signers was not explored.

¹⁰ The only difference is that the word "will" is substituted for "shall."

Section 8(f) of the Act permits unions and employers in the construction industry to enter into collective-bargaining agreements without the union having established that it has the support of a majority of the employees in the covered unit.¹¹ The provision therefore creates an exception to Section 9(a)'s general rule requiring a showing of majority support. *Staunton Fuel & Material*, 335 NLRB No. 59 (Aug. 27, 2001). A contract privileged by Section 8(f) does not bar representation petitions. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub. nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988). Petitioner argues that the parties' 2001-2005 agreement is a Section 8(f) contract that cannot bar an election. The Intervenor and Employer contend that their relationship originated under Section 9(a) rather than 8(f) and that, as a result, the current contract is a bar.

The threshold question raised by the parties' positions is whether the Employer is primarily in the building and construction industry, as required to invoke Section 8(f). The burden of proving that an employer is in the building and construction industry generally rests with the party seeking to avail itself of Section 8(f). *Painters Local 1247 (Indio Paint & Rug Center)*, 156 NLRB 951, fn. 1 (1966). Although the Act does not define the term "building and construction industry," *Teamsters Local 83 (Various Employers)*, 243 NLRB 328, 331 (1979), Congress meant interpretation of the term to be guided by common parlance and usage. *Indio Paint*, supra at 957.

In *Indio Paint*, the employer engaged in the retail and wholesale sale and installation of floor covering, drapes, and prefabricated formica counters. A little less than two-thirds of its revenue derived from awards by general contractors, about one-third came from contracts with individual homeowners, and about seven percent was attributable to over-the-counter retail sales of paint and sundries. The Board observed that under the Standard Classification Manual published by the U. S. Bureau of the Budget, building and construction employers include "special trade contractors" who may work either for general contractors or building owners. The Board also stated that "construction" encompasses new work, additions, alterations, and repairs. *Id.* at 958. It therefore found that the employer was primarily in the building and construction industry as defined by Section 8(f). In so holding, the Board explicitly rejected the relevance of comparing the amount of revenue obtained from sales versus installation. *Id.* at 960.

The Intervenor and Employer claim that the amount of work done by the Employer at existing structures, as opposed to new buildings under construction, militates against a "construction industry" finding. No supporting precedent is

¹¹ Section 8(f) does not, as suggested by the Intervenor, pertain only to pre-hire contracts.

cited.¹² The Board's decision in *Indio Paint* does not turn on a distinction between work on new construction versus extant buildings. In *U.S. Abatement, Inc.*, 303 NLRB 451, 456 (1991), the Board held that an asbestos removal firm was a construction industry employer for purposes of Section 8(f), based precisely upon its involvement in the alteration and repair of existing buildings.

The Board regularly classifies flooring installers as building and construction industry employers. E.g. *General Flooring Systems*, 320 NLRB No. 115 (Mar. 22, 1996) (summary disposition slip opinion); *Carpenters (Rowley-Schlimgen)*, 318 NLRB 714 (1995)¹³; *Painters Local 1247 (Linoleum Studio)*, 233 NLRB 980 (1977). Based on this record, I find, in agreement with Petitioner and contrary to the Intervenor and Employer, that the Employer is in the building and construction industry.

The Board presumes that parties in the building and construction industry intend their relationship to be governed by Section 8(f) rather than 9(a), and imposes a rebuttable burden of proving the existence of a Section 9(a) relationship upon the party asserting that such a relationship exists. *Staunton Fuel*, supra; *H. Y. Floors & Gameline Painting*, 331 NLRB No. 44, slip op. at 1 (May 31, 2000); *Deklewa*, supra at 1385 fn. 41. The rebuttable presumption of Section 8(f) status in the construction industry applies to successor, as well as initial, agreements. *Brannan Sand & Gravel Co.*, 289 NLRB 977, 980 fn. 12 (1988). With Petitioner having met its burden of showing that the Employer is in the building and construction industry, the burden of proof to establish 9(a) status shifts to the Intervenor and Employer.

Showing that a construction industry employer has granted voluntary recognition under Section 9(a) may be accomplished by an examination of either contractual language standing alone, or surrounding circumstances. Proof by way of the former is governed by *Staunton Fuel*, supra, in which the Board expressly adopted the approach taken by the U. S. Court of Appeals for the Tenth Circuit in *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000) and *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000).

In *Staunton Fuel*, the Board held that a recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) status where

¹² The Intervenor cited no cases. The Employer cited two, neither of which stands for the urged proposition.

¹³ In *Rowley-Schlimgen*, the Board held that a seller of office furniture was a construction industry employer for purposes of Section 8(e) of the Act because it subcontracted carpet installation work at construction sites. While the underlying policies of Sections 8(e) and 8(f) are different, as is the statutory language, the same broad interpretation of the term "construction" applies. *South Alabama Plumbing*, 333 NLRB No. 4 (Jan. 18, 2001), ALJ slip op. at 7.

the language unequivocally indicates that (1) the union requested recognition as the majority or Section 9(a) bargaining representative; (2) the employer recognized the union as the majority or Section 9(a) representative; and (3) the employer's recognition was based upon the union having shown, or having offered to show, evidence of its majority support. A contractual statement that the union "represents" a majority of unit employees is consistent with either an 8(f) or 9(a) relationship, and therefore does not pass muster. Nor does a contractual declaration that a majority of unit employees "are members" of the union, because membership may result from a union security obligation under either an 8(f) or 9(a) contract. *Staunton Fuel*, supra.

The recognition language of the collective-bargaining agreement at issue fails to satisfy the foregoing test. It does not contain any explicit claims of majority or 9(a) status, nor acceptance of that status, nor does it affirmatively recite that the Intervenor showed, or offered to show, evidence of majority support.¹⁴ The recital that the Employer recognizes the Intervenor as the "exclusive representative," language relied upon by the Intervenor and Employer, could be descriptive of either a Section 8(f) or 9(a) relationship and is therefore inadequate to establish 9(a) recognition. That the union security provision requires membership after 31 days rather than 7 as commonly prescribed in construction industry agreements, a factor noted by the Intervenor, is immaterial under the Board's *Staunton Fuel* formula.

The other avenue to demonstrate voluntary recognition under Section 9(a) is to prove the same by evidence of conduct. Specifically, there must be evidence that the union unequivocally demanded recognition as the employees' Section 9(a) representative based upon a showing of majority support in the unit, and that the employer unequivocally accepted it as such. *Western Pipeline*, 328 NLRB No. 138 (July 15, 1999); *James Julian, Inc.*, 310 NLRB 1247 (1993); *H. Y. Floors*, supra, slip op. at 1; *Golden West Electric*, 307 NLRB 1494, 1495 (1992).

The lacunae in the instant record preclude a finding that the Intervenor and Employer have met their burden. The lack of evidence as to who signed cards in 1997, and the insubstantiality of the evidence as to how many employees were in the unit at the time, raise doubt as to whether the Intervenor actually enjoyed majority support at the time of recognition. The evidence that the Intervenor never

¹⁴ The 2001-2005 contractual reference to a card check is in a sentence describing what may occur in the future if the Employer's operations expand. It is not a statement concerning the basis of recognition with respect to the present bargaining unit. At any rate, contract language committing an employer to recognize the union's majority status in the future if the union demonstrates that it has majority support will establish 9(a) status only if and when the union subsequently meets that condition within the term of the agreement. *Staunton Fuel*, supra; *Goodless Electric Co.*, 332 NLRB No. 96, slip op. at 4-5 (Oct. 31, 2000). As discussed below, there is no probative evidence of majority support for the Intervenor within the recognized unit, let alone an expanded unit.

offered to prove majority status by a contemporaneous card showing strengthens the doubt. The sketchy evidence regarding the demand for recognition, derived exclusively from one witness who confessed that he only “vaguely” remembered the conversation, falls short of the requirement that majority or 9(a) status be shown to have been expressly demanded and expressly granted.¹⁵

The parties at bar that urge a finding of Section 9(a) status point to the evidence that a majority of unit employees have been members of the Intervenor since recognition was granted in 1997. First, the only such evidence is Mifsud’s undocumented and uncorroborated claim. Second, even if substantiated, such evidence does not show that the parties intended their relationship to be governed by Section 9(a). Evidence that employees are union members, or that the employer has personal knowledge of its employees’ union membership, is not equivalent to a union’s express desire to be a 9(a) representative and an employer’s express acceptance of the union as such. *J & R Tile*, 291 NLRB 1034, 1037 (1988) (such evidence inconclusive in “right-to-work” settings, as well as where the relevant contract contains a union security clause, as here).

Citing *Casale Industries*, 311 NLRB 951 (1993), the Intervenor and Employer argue that the Act’s six-month statute of limitations in Section 10(b) forbids current scrutiny of the 1997 origin of the parties’ relationship. In *Casale*, the Board concluded that the parties clearly intended to enter into a Section 9(a) relationship. Indeed, they sponsored a secret ballot election by which employees could designate one of several local unions as their chosen representative, and agreed to be bound by the results just as if the Board had certified the election. Local 22 won the election. More than six *years* later, a challenge to the bona fides

¹⁵ The sole witness to testify on this subject was the Intervenor’s business agent Reno Mifsud, whose complete representations in this regard were capsulized in the following exchange:

Q [by Mr. Nahat] ...When you had contacted Mr. Bender and told him that a majority of his employees had signed cards, do you remember that conversation?

A Yes. Vaguely.

Q Okay. Was that a conversation that took place over the phone or were you at his office or your office? Do you remember?

A My office.

Q Your office. Okay. Was anybody -- was anybody else present?

A No.

Q Okay. So what exactly happened in that conversation? He, presumably, arrived and what happened next?

A Well, I explained to him that the majority signed cards. Also explained to him that, if he -- if he wanted to recognize the Teamsters, that we should sit down and start negotiating a contract.

Q Okay. And then what did Mr. Bender say?

A He said okay.

Q Okay. Did he ask to see your cards at all in that conversation?

A No.

Q Did you offer to show him your cards at all?

A No.

(Tr 112-113)

of the 9(a) relationship was raised by Local 28, one of the losing participants in the original election, based upon evidence that the ballot had not included a choice of “no union.” The Board ruled that “if a construction industry employer extends 9(a) recognition to a union, and six months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition.” *Id.* at 953. However, the Board limited its holding to situations where the parties clearly intended to create a 9(a) relationship, and distinguished such cases as *Brannan Sand*, *supra*, *J & R Tile*, *supra*, and *American Thoro-Clean*, 283 NLRB 1107 (1987), where there is no showing that the parties meant to forge a relationship under 9(a). Perhaps as significantly, the challenge to 9(a) status in *Casale* was interposed not by a third party, but by a participating local union that had stipulated to the conduct and procedure of the non-Board election, and lost.

Examining the 10(b) problem at length in *Brannan Sand*, the Board stated that it is necessary at times “to go behind the 10(b) period to see what kind of contract is involved in a particular case.” *Id.* at 981. The Board continued:

Nothing in *Bryan*¹⁶ precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period. Going back to the beginning of the parties’ relationship simply seeks to determine the majority or non-majority based nature of the current relationship and does not involve a determination that any conduct was unlawful, either within or outside the 10(b) period.

Id. at 982.

Board dictum regarding Section 10(b) in *Staunton Fuel*, fn. 10, discusses options not of third parties, as Petitioner is here, but of a contracting employer to belatedly challenge its own recognition. The dictum does not cloud the continued vitality of the above-cited Board pronouncements concerning 10(b) in *Casale Industries* and *Brannan Sand*. See also *American Automatic Sprinkler Systems, Inc. v. NLRB*, 163 F.3d 209, 218 (4th Cir. 1998) (*Casale* rule barring 10(b) evidence of invalid recognition is inapplicable in construction industry, where pre-hire and non-majority recognition is permissible).

¹⁶ *Machinists Local Lodge 1424 v. NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960).

For the foregoing reasons, I find that the collective-bargaining agreement between the Intervenor and Employer is a Section 8(f) contract. As a consequence, it does not bar an election.¹⁷

5. Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time laborers, apprentices, mechanics, journeyman mechanics, senior mechanics, and master mechanics employed by the Employer at and out of its facility located at 23112 Schoenherr, Warren, Michigan; but excluding sales employees, office clerical employees, and guards and supervisors as defined in the Act.

Those eligible to vote shall vote whether they wish to be represented for purposes of collective bargaining by Petitioner, Intervenor, or no union.

Dated at Detroit, Michigan, this 28th day of September, 2001.

(SEAL)

/s/ William C. Schaub, Jr.

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¹⁷ I do not rely upon Petitioner's alternative arguments that the contract fails as a bar because it was prematurely extended and contains an illegal union security clause. The record does not support either contention.